United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2644-45

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United States Court of Appeals
For the Second Circuit

DOCKET No. 74-2644

In the Matter of the Petition for
Limitation of Liability,
of
MARINE SULPHUR TRANSPORT CORPORATION,
As Owner,
and
MARINE TRANSPORT LINES, INC.,
As Demise Charterer,
of the Vessel MARINE SULPHUR QUEEN,
Petitioners-Appellees and Appellants,

HALGA WATSON, as widow and Executrix of Estate of
George Watson, deceased,
Claimant-Appellant and Appellee.

DOCKET No. 74-2645

HALGA WATSON, as widow and Executrix of the Estate of
George Watson, deceased,
Plaintiff-Appellant and Appellee,
against
MARINE SULPHUR TRANSPORT CORP. and
MARINE TRANSPORT LINES, INC.,
Defendants-Appellees and Appellants.

ON CROSS APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

BRIEF ON BEHALF OF HALGA WATSON, CLAIMANT AND PLAINTIFF-APPELLANT AND APPELLEE

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BRIEF ON BEHALF OF HALGA WATSON
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PRELIMINARY STATEMENT

The Opinion of District Judge John M. Cannella, and the Order, Decree and Judgment thereon, from which this appeal is taken, is not officially reported.

STATEMENT OF ISSUES PRESENTED

1. Did the District Court err in completely disregarding the detailed evidence, both in the form of documents and testimony, submitted by the decedent's widow on the issue of the pecuniary loss sustained by her and instead apply mechanically an "all purpose"* 50% formula which was totally unrelated to the evidence in the case?

2. Did the District Court err in deducting from the pecuniary loss sustained by the decedent's widow, certain sums collaterally received by her in the form of an accidental death benefit from the decedent's welfare plan?

3. Did the District Court err when, in ascertaining the pecuniary loss sustained by the decedent's widow, it deducted from the decedent's projected annual earnings amounts referable to income tax in those years when the decedent's

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* According to the trial judge, the 50% formula applies to all cases of a deceased husband who leaves a wife and no children, provided he supported his wife.

gross income exceeded $25,000?

4. Did the District Court err in failing to award to the widow, as part of the pecuniary loss sustained by her, amounts referable to medical benefits from the decedent's union welfare plan which terminated upon the death of the decedent?

5. Did the District Court err when, in calculating the losses sustained by the widow during the decedent's projected retirement years, it failed to add an annual 4 1/2% increment for projected inflation and/or cost of living increases?

STATEMENT OF THE CASE

Halga Watson, the appellant in this case, is the widow of George Watson, who was serving as chief mate aboard the vessel SS Marine Sulphur Queen when it disappeared with all its crew in the Gulf of Mexico in February, 1963, while on a voyage from Beaumont, Texas to Norfolk, Virginia.

On March 1, 1963, Marine Sulphur Transport Corporation, as owner and Marine Transport Lines Inc., as demise charterer, commenced a proceeding in the United States District Court for the Southern District of New York seeking exoneration from or limitation of liability from the damages arising out of the loss of the vessel. (63 Ad 237) In that Admiralty proceeding, Halga Watson filed an answer and a claim, seeking to recover damages arising from the death of her husband.

Shortly before the commencement of the limitation and exoneration proceedings, Mrs. Watson had filed suit in the United States District Court for the Southern District of New York under the Jones Act, Death on the High Seas Act and the General Maritime Law seeking to recover damages sustained by her arising from the death of her husband. Coincident with the filing of the Petition for exoneration and limitation, the court entered an order staying the further prosecution or commencement of any other actions relating to damages arising out of the loss of the vessel.

On or about May 12, 1970, in the Admiralty proceeding, the Honorable John M. Cannella, United States District Judge for the Southern District of New York, denied the Petition of Marine Sulphur Transport Corp. and Marine Transport Lines, Inc. and directed that:

> "Trial of the sole remaining issue of compensatory damages will proceed as soon as counsel can be heard." 312 F. Supp. 1081

After extensive appellate procedures,* the liability of Marine Sulphur Transport Corporation and Marine Transport Lines Inc. to pay for damages sustained was finally determined by action of the United States Supreme Court in denying the companies' Petition for a Writ of Certiorari with respect to the liability issues in the matter. Such liability against the two companies had previously been determined by this court in 1972, when it affirmed the decision of Judge Cannella holding the companies liable for damages. In re Marine Sulphur Queen, 460 F. 2nd 89 (2nd Cir. 1972), Cert. denied, 409 U. S. 782 (1972).

Following such final determination on the issue of liability, six separate trials on damages arising from the death of six of the ship's officers were held before the Honorable John M. Cannella in November and December, 1973. Claims arising out of the death of the other 33 crew members were otherwise settled.

* These procedures also involved other parties to the matter, the impleaded Respondent Bethlehem Steel Corp. and United States Fire Insurance Co., the insurer of the cargo. These other parties are not involved in this appeal.

On July 31, 1974, Judge Cannella issued a consolidated Opinion, constituting his findings of fact and conclusions of law, on the amount of damages sustained arising from the death of each of the six deceased seamen. (J.A. p. 264a-280a)* The amount for Halga Watson was $204,748.

The Opinion of the Court concluded in the following manner:

> "The foregoing shall constitute the Court's findings of fact and conclusions of law. Submit decrees in accordance with the foregoing, together with application for allowance of fees and disbursements in connection with infants' claims." (J.A. p. 261a, 262a)

On November 25, 1971, a decree, order and judgment were entered awarding damages to Halga Watson in the sum of $204,748. (J. A. p. 281a, 282a) This appeal is taken from the Opinion and Judgment thereon, on the grounds of errors resulting in an insufficient award.

* "(J.A. p.)" are citations to the Joint Appendix; other citations are to parts of the Record not reproduced in the Joint Appendix.

STATEMENT OF RELEVANT FACTS

Pecuniary Loss To The Widow

George and Halga Watson were a close, devoted couple. Their life was remarkable and unique in the extent to which they shared their enjoyment and activities together, and the efforts that they made to be together as much as possible.

They were married in February 1954, and had no children. (J.A.p.17a) Mrs. Watson was the decedent's sole dependent beneficiary. At the time of his death, Captain Watson was serving as Permanent Chief Mate and relief Master on the SS Marine Sulphur Queen, (J.A. p.24a) a vessel engaged in the coastwise carriage of molten sulphur.

The vessel's Southern terminus, its loading port, was at Beaumont, Texas. (J.A. p. 39a) Mr. and Mrs. Watson lived in Galveston, and on just about every trip when the vessel came to Beaumont, Mrs. Watson would meet the ship and stay with her husband on the vessel, which the Company permitted. (J.A. p.39a,40a,47a) She was allowed to sleep aboard the vessel, which would generally remain in Beaumont overnight, arriving in the afternoon and leaving the next afternoon. (J.A.p.39a,40a)

Captain Watson's actual employment aboard the vessel was for nine months of the year, the balance of the time being on paid vacation. (J.A. p.193a)

When Captain Watson was at home they did not do much entertaining. The deceased liked to stay at home and Mr. and Mrs. Watson preferred to be by themselves rather than have a lot of people in. (J.A. p.51a, 52a) While on vacation, some of the time was spent on motor trips together, one such trip being to the Grand Canyon area, and another to Florida. (J.A. p. 52a) However, such travel trips were generally for about three or four weeks out of Captain Watson's three months' vacation, the bulk of the vacation time being spent at home. (J.A. p. 52a)

Captain Watson's hobbies were also home-oriented. He liked to build model ships, collect stamps and fool around with carpentry work. (J.A. p.51a)

Captain and Mrs. Watson lived in a house in Galveston, Texas, which they owned jointly and in which, of course, Mrs. Watson lived whether or not her husband was at sea, and on which there was a substantial mortgage and for which there were other annual expenses. (J.A. p.35a-38a,188a) They also owned a car for which they had taken out a bank loan (J.A. p. 37a). Mrs. Watson enjoyed the use of the car whether or not her husband was at sea.

Mr. Watson paid for an insurance policy on his life, of which Mrs. Watson was the sole beneficiary (J.A.p.36a,64a) and Mrs. Watson was also executrix and sole beneficiary under

the decedent's will. (J.A. p. 36a)

They had a checking account and a savings account, both in their joint names (J.A.p.36a,37a) with a balance in the savings account, at the time of Captain Watson's death, of only about $500.00 (J. A. p. 41a)

Without objection by the Shipowners, the claimant produced evidence in detail of what was spent out of the deceased's earnings for such things as the mortgage, interest, utilities and furnishings of their home, payments for the car, payments for insurance and payments for the wife's clothing and medical expenses. (J.A. p. 42a-46a, 153a-190a)

Much of this evidence was derived from records maintained by the claimant while her husband was alive (J.A.p.42a,43a) The decedent's own personal expenses were minimal, (J.A.p.46a-51a) his food and lodging being provided by his employer while he was on board the vessel. The District Court found that $1200. was expended by the deceased annually for his own use. (J.A. p. 249a)

The proof that was submitted by the claimant showed that with the exception of the amounts expended annually for the decedent's own personal consumption, the entire balance of his available income was spent either directly for his wife, her own food, clothing, medical expenses, etc.) or else on items and for purposes which they shared in common and for which Mrs. Watson received the benefit (the home, car, vacations to-

gether, etc.). (J. A. p. 42a-46a, 153a-190a)

Nevertheless, the District Court totally ignored all of this evidence. There was not one word of reference to this evidence in the entire opinion of the Court - no discussion about it, no consideration of it in any manner, shape or form. It was as though nothing at all had been produced at the trial.

Instead, the District Judge mechanically applied a formula set out by Judge Weinfeld of the United States District Court for the Southern District of New York in Petition of Marina Mercante Nicaraguense, S. A. 248 F. Supp. 15 (S.D.N.Y. 1965) modified on other grounds 364 F. 2d 118 (2d Cir. 1966), and set the widow's pecuniary loss at 50% of the available net income of the deceased after deducting an allowance for his personal expenses. Such a formula bore absolutely no relationship to the evidence submitted to the Court on the pecuniary loss sustained by the widow as a result of the death of her husband. We might just as well have simply said that George Watson died and left a wife and no children, made no effort to show any details of support and submitted no document showing the expenditures that were made from the deceased's earnings. (J.A. p. 250a)

Deduction of Accidental Death Benefit

Shortly after the loss of the Marine Sulphur Queen, Mrs. Watson received a $5,000.00 insurance benefit representing the death benefit proceeds from a Second Seaman's Insurance

Policy* and a $10,000 accidental death benefit from the MM&P Pension & Welfare Fund, a jointly administered labor-management benefit plan from the decedent's union. (J. A. p.161a,162a)

In computing the pecuniary loss sustained by Mrs. Watson, Judge Cannella deducted the full amount of the $5,000. proceeds of the Second Seamen's Insurance, as well as $9,000.of the $10,000 Welfare Plan benefit. (J. A. p. 278a)

The $9,000 deduction by Judge Cannella relative to the benefit fund payment was apparently predicated on the companies' argument that under the decedent's pension plan, there would be a normal death benefit payable of only $1,000 if he died after retirement,and inasmuch as the District Judge included an award for retirement earnings, the Company should get a credit for the difference between this $10,000 accidental death benefit received and the $1,000 normal post-retirement death benefit, and the award to the widow should therefore be reduced by such $9,000 difference. (Petitioners' Brief on Damages, pages 2-4).

* The answer to interrogatory No. 22 (J.A.p. 161a) sets forth $5,800 received under the Second Seaman's Insurance Policy. However, only $5,000 represented death proceeds, the additional $800 representing reimbursement for loss of clothing and equipment, which latter payment was required under the decedent's collective bargaining agreement. The Companies, in their brief on damages, requested credit only for the $5,000 death benefit amount (Petitioners' Brief on Damages, page 2)

Deduction for Income Taxes

In its decision, the District Court made a deduction from the gross earnings of the decedent referable to income taxes in those years where the income reached $25,000 or more. To ascertain the tax amount, the Court used standard deductions and exemptions from tax tables for the pertinent years, and for years beyond 1973, the Court projected those of that year. (J.A. p 250a)

Such deductions for taxes were made in the years 1970 through 1975, where the projected annual gross income ranged between $28,404 and $34,933. The total amount of taxes deducted was $42,678, or an average of $7,113 per year. (J.A. p.278a,279a)

The amount deducted by the District Court was greater than that urged by the Companies. The District Court made an average deduction of 22.7% for taxes, whereas the companies claimed that only a tax deduction of 10% should be made in those years when earnings were $25,000 or more. This 10% deduction, the companies conceded, "being less than the probable tax liability on such incomes, would serve to compensate for the impact of future income taxes that might be payable on income derived from lump sum awards ....." (Companies' Reply Brief on Damages, p. 4,5).

No Award Made For Fringe Benefits

As the wife of a ship's officer, Mrs. Watson was en-

titled to certain health and medical benefits under the MM&P Welfare Plan, a jointly trusteed labor-management fund to which his employer contributed for each day of his employment. After his death, her eligibility for such benefits terminated. (J.A. p. 195a) Although the claimant offered evidence of the actual cost of substitute coverage obtained after her husband's death (J.A. p. 54a,55a) the District Court denied any recovery for the value of the fringe benefits which would have continued to inure to her benefit had her husband continued to live.

No Post-Retirement Increment Allowed For Projected Inflation and/or Cost of Living Increases

The current collective bargaining agreement of the decedent's union, the International Organization of Master, Mates & Pilots, is for a three year period, due to terminate on June 15, 1975. Under the terms of that agreement, a 6% wage increase was provided in the first year (June 16, 1972-June 15, 1973), and there was sufficient money available in the second and third years to provide for a 6% increase annually in each of those two remaining years.* (J.A.p. 191a, 192a)

* The trial of this case took place in December 1973. Since that time, a retroactive 6% increase, for the year June 16, 1973 to June 15, 1974, and an 8% increase, for the year June 16, 1974 to June 15, 1975, were placed into effect.

The prior contract, running from 1969 through 1972 provided for annual increases of 6% for each of the years 1969, 1970 and 1971. (.J.A. p.145a)

The testimony of Dr. Oscar Ornati, a labor economist, was that, in his opinion, for the period 1974 through 1995 there will be an average annual price increase of 4.5%. (J.A. p.158a)

In two recent collective bargaining agreements of the Masters, Mates & Pilots, pensions were increased by 5% for existing pensioners. (J.A. p.111a, 112a) In the last collective bargaining negotiations, one of the union's proposals was for an automatic cost of living adjustment for the pension plan. However, at that go around, the union was not successful in obtaining such a provision. (J.A. p. 112a)

Under the Federal retirement system, there is currently an automatic cost of living escalator clause. Under such clause, at any time that there is a 3% increase in the consumer price index, Federal pensions are increased by a like amount. (J.A. p. 119a, 120a)

Amendments to the Social security program, which became effective this year, provide an automatic cost of living increase similar to the automatic Federal retirement system cost of living escalator. That is, every time there is an increase of at least 3% in the consumer price index, the Social Security pensions will be increased proportionately. (J.A. p. 120a)

Judge Cannella found that the decedent would have retired at the end of December, 1975, and would have remained on pension through the end of 1988, his projected date of death. (J.A. p. 261a, 273a, 274a)

He fould that the decedent would retire with a pension of $14,110 annually, based on the 30-year pension formula. This is calculated by averaging the highest five years of base pay in the 10 years of employment prior to retirement, with 60% of such average income constituting the annual pension amount. (J.A. p.249a, 280a)

He also found that this annual pension income would remain the same for each of the thirteen years of retirement, with no increment provided in any of those years for projected inflation and/or cost of living increases. (J.A. p.280a)

POINT I

THE DISTRICT COURT ERRED IN IGNORING THE DETAILED PROOFS THAT HAD BEEN PRESENTED WITH RESPECT TO THE CLAIMANT'S PECUNIARY LOSS IN FAVOR OF APPLYING A FORMULA THAT BORE NO RELATIONSHIP TO THE EVIDENCE

In the trial before the District Court, the claimant produced substantial evidence as to her and her husband's standard and mode of living. Mr. and Mrs. Watson were a uniquely close, devoted couple. They had no children, and shared their enjoyment and activities together to a remarkable extent.

Without objection by the shipowner, the claimant produced detailed evidence of the expenditures that were made out of the decedent's earnings for his own personal consumption as well as detailed evidence of the expenditures made directly for his wife, and for the expenditures that were made for items and for purposes which they shared in common and for which Mrs. Watson received the benefit.

Nevertheless, in determining the amount of pecuniary loss sustained by Mrs. Watson as a result of the death of her husband, the District Court totally ignored all of the unchallenged evidence submitted, and instead, as urged by the shipowners, mechanically adopted and applied a formula bearing

no relationship whatever to the evidence at trial, which set the widow's pecuniary loss at 50% of the available net income of the deceased, after deducting an allowance for his own personal expenses.

Such an approach by the District Court was erroneous. The evidence showed, from the testimony of Mrs. Watson, that her husband spent for his own personal consumption some $1,530 annually, consisting of the following amounts:

> Ten or twelve pairs of khakis per year at $20.00 per pair ($240.00 annually); three pairs of work shoes and one or two pair of dress shoes per year at $22.00 to $25.00 per pair ($125.00 annually); one suit every year or every two years at $150.00 per suit ($150.00 annually); dress clothes, such as slacks and shirts around $200.00 or $300.00 a year($300 annually); stamp collection, $75 or $100 a year ($100 annually); and material for ship models, $10 to $15 per year ($15 annually). In addition, he kept about $50 a month cash for his own personal expenditures such as cigarettes, liquor and meals ($600 annually). (J.A.p. 46a-51a)

The additional detailed evidence presented without challenge showed that the entire balance of the deceased's

available income was spent either directly for his wife (her own food, clothing, medical expenses, etc.) or else on items and for purposes which they shared in common and for which Mrs. Watson received the benefit (the home, car, vacation together, investment property, etc.) It is submitted that it is this entire balance which represents the loss sustained by the widow, and that it was this entire balance amount that the District Court should have awarded the widow for her losses.

The District Court gave no reason for not considering the detailed evidence that had been presented to it. Indeed, we submit that no viable reason can be given for ignoring the evidence presented. Instead, Judge Cannella, in applying the formula, simply stated that in determining the losses, he has followed

> "Judge Weinfeld's formula in Petition of Marina Mercante Nicaraguense, S.A., 248 F. Supp. 15, 27 (S.D.N.Y. 1965) modified on other grounds 364 F.2d 118 (2d Cir. 1966). Cf Nye v. A/SD/S Svenborg, 358 F. Supp. 145, 153 (S.D. N.Y. 1973); aff'd in part and rev'd. in part on other grounds ---F.2d.----, (2d Cir. 1974)" (J.A. p. 250a) *

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* Even the premise of this formula is, we submit, incorrect but this will be discussed later.

This formula sprung and developed from a series of cases in this circuit in which no such detailed evidence on expenditures and life styles of the deceased and the survivors was presented.*

No reported federal case has held that as a matter of law, a widow without children is entitled to receive no more than 50% of the anticipated available income of the deceased after the deduction of the deceased's personal expenses, on the theory that she should not recover in full for household expenditures and other jointly-enjoyed items for which she received the benefit in the deceased's life-time, which also inured to the benefit of the deceased.

Were this the law, then the substance of the "Weinfeld formula" would have to be charged to the jury in cases arising under the Federal Employers Liability Act,

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* Even in this circuit, a more reasonable rule of thumb than the 50% formula, where no detailed evidence was presented on expenditures, was applied by Judge Kaufman of this Court when sitting as a District Judge in Rogow v. United States, 173 F. Supp. 547 (S.D.N.Y. 1959). This was an action for wrongful death wherein the deceased, a freelance writer, was survived by his widow and two children. After noting that there was no evidence in the case concerning the personal expenditures of the deceased save the widow's statement that her husband was frugal about clothing, Judge Kaufman felt it reasonable to attribute $10,800 out of an annual income after tax of $13,806.14 to contributions that the deceased would have made to his family annually throughout the remaining joint life expectancy of the deceased and his widow, without any reduction after the minor children left the household, 173 F. Supp. at 560.

45 U.S.C. §51 et. seq. and the Jones Act 46 U.S.C. §688, which is not the case.*

What the District Court has actually done in this case is to fashion the Weinfeld formula into a rule of law, and, moreover, establish the 50% as merely an upper limit of recovery for a widow, capable only of being effectively reduced, never increased. That is to say, the District Court would still be obliged to allow the defending party to offer evidence to show greater personal consumption by the deceased himself - for drinking, gambling, carousing, etc. - thus reducing the net available balance of the decedent's earnings out of which the widow would still only be awarded 50%. This would result in a one-way street where only evidence favorable to a defendant to increase the amount of personal consumption

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* The charge to the jury on pecuniary loss sustained by dependent beneficiaries in a death case under the F.E.L.A. and Jones Act, as set forth in Devitt and Blackmar, Federal Jury Practice and Instructions, Volume 2, p. 353 is as follows:

> "§89.34. Damages in Death Case
>
> If you find for the plaintiff, it then becomes your duty to award damages such as you find will fairly and justly compensate [list beneficiaries as widow, minor children, parents, etc.] for (his, her, their) actual losses which can be measured in money which you find (he, she, they) sustained as a direct result of the death of_____."

would be admitted, but an attempt by the widow to show that she in fact received more than 50% of the benefit of the house and expenditures therefor (by reason, let us say, of the husband's being away from the home 75% of the time, as in the instant case; or that the widow was ill or bedridden and required special costly foods, medical treatment, etc.) would be barred by reason of the inviolate 50% formula.

The adoption of a formula in the instant case, where detailed evidence was produced as to expenditures and the way of life of Mr. and Mrs. Watson, was wrong. The proper approach to have determined the pecuniary loss sustained by Mrs. Watson was to determine the amount of personal expenses of the decedent, subtract this from his projected earnings, and award the balance as damages to his widow.*

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* In one of the other six cases tried, that of Captain Fanning, the District Court also ignored evidence submitted on the question of actual damages sustained by the minor children of the deceased by reason of the loss of care, affection, attention and guidance. The children of the deceased, Beda and Mark, who were 14 and 16 years old, respectively, at the time of their father's death, testified with great emotion at the trial how the loss of their father's strength, support and guidance resulted in positive damage to each of them as they attempted to make their way through the difficulties of adolescent growing up. Both children suffered severe setbacks. Yet, the District Judge totally disregarded this evidence, and again, mechanically applied a formula of $750 per year to each child for loss of nurture during the period of each child's minority (J.A. p. 254a, 256a, 257a) which was the same formula in all cases for children who were in the same general age category. The Fanning family, after waiting 11 years, gave up the fight and didn't appeal.

The Fallacy of the 50% Formula

As set forth above, no formula is an appropriate means of determining pecuniary loss where, as here, detailed evidence was submitted to the court on the expenditures that were made out of the deceased's earnings. But at any rate, the premise of a 50% formula applied to a surviving widow, is erroneous.

The surviving widow cannot be denied the full value of the pecuniary benefits which she could be reasonably expected to have continued to receive if the deceased had not died, merely because the deceased also enjoyed the home, the car and other such fruits of his earnings. Because the deceased also enjoyed them does not mean that they cost any less during his lifetime or could be provided for at any less cost after his death. The damages recoverable in an action for wrongful death are the pecuniary benefits which the surviving dependents might have reasonably received if the deceased had not died. Such damages are to compensate for the reasonable expectation of pecuniary assistance or support of which the surviving dependents have been deprived. Michigan Central Railroad Company v. Vreeland 227 U.S. 59 at p. 70, 33 S. Ct. 192 at p. 196, 57 L. Ed 417 at p. 422 (1913). As the Supreme Court made clear in Vreeland, supra, the focus of the inquiry is upon the value of what the surviving dependents had a reasonable expectation of receiving at the death of the deceased.

The simultaneous enjoyment of the deceased in various items shared in common with his dependents renders their value no less. The concept that when the deceased dies and his support ceases, it causes the surviving widow to sustain a pecuniary loss of only half a house or half a car or half the gas and electricity needed for the home, is an erroneous one.

The fallaciousness of the theory that the value of the support furnished the widow and other surviving dependents is to be reduced because the deceased also shares in the use of certain items of such support has been well stated by the Special Masters appointed by the United States District Court for the Northern District of Ohio, Eastern Division, to hear evidence and assess damages and apportion the settlement funds in the litigation arising out of the sinking of the SS Daniel J. Morrell on the Great Lakes (In re Cambria Steamship Co., Civil Action No. C 67-61). The report of the Special Masters, in part, states as follows:

> "While the majority of cases have utilized the equal-portion method, particularly in the husband-wife situation,none of the cases holds that this is a rule of law. Rather, the method appears to have been adopted as a rule of thumb. Indeed, none of the cases, so far as we have

been able to determine, have considered and rejected the decedent's consumption method of computation. Indeed, it seems that the prevalent use of the equal-portion method is due to the fact that that is the more obvious of the two methods.

"It is not the more accurate method, however. It overlooks the fact that a large portion of a family's expenditures are common expenditures. The basic touchstone in ascertaining damages under the Jones Act is the pecuniary loss suffered by each claimant. The Court must determine what the claimant had prior to the decedent's death which he no longer has. In the case of a family unit, the surviving family members benefitted from the decedent's entire earnings, with the exception of that portion which the decedent expended solely for his own consumption. The survivors benefitted not only from the amount which they expended for their own personal consumption, but also from the amounts which were expended for the family's common expenses.

"Let us assume, for example, that a husband and wife live alone in their one-bedroom

home, on which there is a substantial mortgage. They own a car on which there is also a mortgage. The husband is the only one who works. What is the wife receiving from her husband in terms of pecuniary benefits? First of all, she is receiving the opportunity to live in the one-bedroom house. She is receiving the opportunity to use the car; and she is receiving additional amounts which she expends for her own personal consumption. She is benefitting from her husband's entire earnings, except for that small portion which her husband spends solely for his own personal consumption.

"In this situation it is hardly accurate to say that only 1/2 of the husband's earnings should be allocated to the consumption of his wife. If the husband is removed from the picture entirely, the wife continues to consume the use of the house and the use of the car. So, if we assume that the husband and wife each expend 1/3 of his total earnings for their individual consumption, and 1/3 of his total earnings was expended for the house and car, the wife's actual pecuniary loss by reason of her husband's death is the amount of two-thirds

(2/3) of his annual earnings. She has benefitted from the expenditure of two-thirds (2/3) of his annual earnings, since she has benefitted from the one-third (1/3) portion attributable to her individual consumption and from their one-third attributable to their joint compensation.

"The 'pecuniary loss' sustained by the wife is'...reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased' Cleveland Tankers v. Tierney, 169 F.2d 622 (6th Cir., 1948). This must include both her individual and joint benefits. Thus, it appears that a half-and-half allocation is not the most accurate measure of the true pecuniary loss suffered by the wife upon the death of her husband.

" That is particularly true in the case of seamen on the Great Lakes. The men who sailed on the Morrell, for example, were gone from their homes approximately eight months of the year. During that period, the ship provided them with accommodations and meals at the company expense. So during the eight-month period the men were at sea, their wifes and children lived at home alone. Thus, expenditures for housing, fuel, light, tele-

phone,water, taxes, and food were made almost exclusively for the benefit of the wives and children. The seamen, who were given food and lodging aboard ship, spent only small amounts for their own support during the shipping season. Usually they would be in a port for only a few hours at a time, and many were required to work aboard ship even during that period. Thus, the seamen consumed less than a proportionate share of their family's income.

"We have, therefore, determined that an equal-portion allocation does not properly compensate the survivors for the 'pecuniary loss' which they sustained by reason of the decedents' deaths. The only accurate method of computing their pecuniary loss is to determine the portion of a decedent's total earnings which he expended solely for his benefit and to allocate the remainder of his total earnings among the surviving family members. This provides a more accurate reflection of the true situation. The surviving family members benefitted not only from their individual expenditures, but also from the common family expenditures. With the decedent gone, they have lost the source of both of those benefits.

"The difficult question in this method of computation is determining the amount of the decedent's personal consumption. Several of the claimants offered testimony by which they sought to establish the precise amount of this personal consumption. Some produced evidence as to the amount the decedent customarily took from his monthly pay for his personal expenses on ship. In some cases, in fact, the company sent the decedent's paycheck directly to his home, and the decedent's wife would send a fairly standard amount back to him for his expenses on ship.

"The most accurate way to compute the personal consumption of each decedent would be to consider the peculiar facts and circumstances of each individual case. Undoubtedly, there were differences in the personal consumption of each one of the decedents. Some spent more than others. Some had hobbies; others did not. Some were in financial difficulty; others were able to save. Some had personal habits which required periodic expenditures; others did not.

"We would prefer to be able to make a precise estimate of the personal consumption of each of the decedents. Our task as Special

> Masters is to make the most accurate possible determination of the pecuniary loss sustained by their survivors. No blanket estimate of personal consumption could ever be as accurate as a specific case-by-case examination."
>
> Report of Special Masters
> October 20, 1972, pps. 54-58

The District Court's adoption of a formula to determine the pecuniary loss sustained by Mrs. Watson, widow of the decedent, in total disregard of the detailed evidence submitted at the trial on the standard and mode of living of Mr. and Mrs. Watson and the expenditures made out of the deceased's earnings, was error. Accordingly, the case must be returned to the District Court for findings as to the pecuniary loss sustained by Mrs. Watson in light of the evidence presented, and that such loss should be determined by ascertaining the amount of the decedent's personal expenses, subtract such personal expenses from the decedent's projected earnings, and award the balance as damages to his surviving widow.

POINT II

THE DISTRICT COURT ERRED IN DEDUCTING FROM HER LOSSES A $9,000 ACCIDENTAL DEATH BENEFIT RECEIVED BY THE DECEDENT'S WIDOW FROM A COLLATERAL SOURCE, A "FRINGE BENEFIT" FROM THE WELFARE FUND OF THE DECEDENT'S UNION.

In computing the pecuniary loss sustained by the decedent's widow, Judge Cannella made a deduction in the sum of $14,000, which was comprised of a $5,000 death benefit received by Mrs. Watson from a Second Seaman's Insurance policy, and a $9,000 accidental death benefit received by her from the welfare fund of her husband's union. (J.A. p. 278a)

We do not quarrel with the $5,000 deduction on account of the Second Seaman's benefit. This was a war risk policy taken out gratuitously by the Companies, and on which they had paid all the premiums. (Moore-McCormack Lines, Inc. vs. Richardson, 295 F. 2d 583, 588 (2d Cir. 1961), cert. denied 368 U.S. 989 (1962). The Court erred, however, in making the additional deduction of the $9,000 received from the welfare fund.

Contributions to the several jointly administered union benefit plans are required under the collective bargaining agreements of the decedent's union, and as such represent payments in consideration for an employee's services.

(See, for example, Watson Ex. 6, 1961 Collective Bargaining Agreement, page 18)

This amount thus paid to Mrs. Watson from the union's benefit fund represented funds coming from a "collateral source", and consequently no credit for such payment, under any theory, should be given to companies.

The viability of the collateral source rule in this Circuit has recently been declared in the case of Blake v. Delaware and Hudson Railway Company, 484 F. 2nd 204 (2nd Cir. 1973).

In that case, brought under the F.E.L.A., the defendant railroad had voluntarily paid certain medical bills of the plaintiff, for which it received almost full reimbursement from the Travelers Insurance Company under a group policy covering the plaintiff's employees. The group policy was maintained pursuant to plaintiff's collective bargaining agreement.

Despite the payment of the bills by the company, such payment was declared to be from a "collateral source" and the plaintiff was entitled to include the amount of the hospital bill in his claim for damages.

In an extended discussion supporting the applicability of the collateral source ruling in F.E.L.A., Jones Act and other cases governed by federal law, the court stated as follows:

"A number of more recent decisions have considered whether the collateral source rule should be applied in FELA and Jones Act cases, and in other cases governed by federal law. See, e.g., Eichel v. New York Central R.R. Co., 375 U.S. 253, 84 S. Ct. 316, 11 L.Ed. 2d 307 (1963); Hartnett vs. Reiss Steamship Co., 421 F. 2d 1011, 1016, n. 3 (2 Cir. 1970); Haughton v. Blackships, Inc., 462 F. 2d (5 Cir. 1972); Gypsum Carrier, Inc. v. Handelsman, 307 F. 2d 525 (9 Cir. 1962); Hall v. Minnesota Transfer Railway Co., 322 F. Supp. 92 (D. Minn. 1971). Other federal decisions have discussed the rule in cases governed by state law, including actions under the Federal Tort Claims Act and maritime death cases. Klein v. United States, 339 F. 2d (2 Cir. 1964); Cunningham v. Rederiet Vindeggen A/S, 333 F. 2d 308 (2 Cir. 1964); United States v. Price, 288 F. 2d 448 (4Cir. 1961). Both groups of cases generally apply the rule to deny credit for payments made by a defendant in circumstances analogous to those in the case at bar. Cf. Thomas v. Humble Oil & Refining Co., 420 F. 2d 793 (4 Cir. 1970). See also Restatement of the Law Second - Torts - Tentative Draft No. 19, March 30, 1973, §920A and Comment, p. 167 et seq.

In the recent case of Haughton v. Blackships, Inc., supra, the court said (462 F. 2d at 790):

"* * * In considering the applicability of the collateral source rule, the basic principle to be applied is that the employer-tortfeasor is not entitled to mitigate damages by setting off compensation received by the employee from an independent source. However, it is also true that the source of the funds may be determined to be collateral or independent, even though the employer-tortfeasor supplies such funds, United States v. Price, 288 F. 2d 448 (4th Cir. 1961). See also Annot., 75 A.L.R.2d 886 (1961).

"Application of the collateral source rule depends less upon the source of funds than upon the character of the benefits received, Gypsum Carrier, Inc. v. Handelsman, 307 F. 2d 525, 534-535 (9th Cir. 1962). The mere fact that the employer-tortfeasor has contributed money (by payment of premiums contributions, etc.) to the fund from which the benefits derive does not establish that such fund may not be a collateral source, Hall v. Minnesota Transfer Ry. Co., 322 F. Supp. 92, 95 (D. Minn. 1971), and cases cited therein."

Hall was an FELA case, in which the collateral source was the same group policy GA 23,000 involved in the instant case. Relying on United States v. Price, supra, Judge Neville reasoned as follows, in two passages quoted in Haughton:

"* * * The collective bargaining contract between that employee group and the defendant Railroad includes, as an economic term, a requirement that the employer pay premiums directly to the insurer, much as an employer might at the direction of his employee deduct money from wages and forward them directly to that employee's creditor or bank savings plan. This policy is, in short, a fringe benefit given in part consideration for the employee's services. It is in no sense a mere gratuity nor an arrangement by which the company has undertaken voluntarily to indemnify itself against possible liabilities to injured employees under the FELA.

"* * *

"On the basis of the foregoing, the court concludes that where the insurance policy is one of general hospital and medical coverage upon which the insured may make claim without regard to liability on the part of the employer, such a policy is a fringe benefit maintained by the employer and is in effect part of the employee's income for services rendered, and the collateral source rule prohibits set-off of premiums paid or benefits received thereunder by the employee. * * *" 322 F. Supp. at 96, 97, quoted in 462 F. 2d at 790, 791.

In Haughton the Fifth Circuit added:

"The policy considerations for the collateral source are apparent. On the one hand, an employer-torfeasor who voluntarily undertakes to indemnify itself against liability by payment into a fund for that purpose, should not be penalized by permitting the plaintiff a double recovery of his benefits under the fund as well as his full measure of damages. On the other hand, where the employer-tortfeasor makes payment directly into a fund established for an independent reason, or where such payment by the employer should be considered in the nature of fringe benefit or deferred compensation, the employer should not be entitled to benefit by setting off such income in mitigation of his responsibility as a tortfeasor." 462 F. 2d at 791.

In both cases, Hall and Haughton, the railroad was denied the claimed credit. Those decisions are in accord with the opinions of this Court cited above." 484 F. 2d at 205-207

In the Blake case, as here, the Company had sought to offset the entire amount of benefits paid, and not merely obtain an offset referable to the amount of premiums paid by the Company applicable to the plaintiff. In neither case did the company seek to prove any such amounts. See 484 F. 2d 204, 205.

Based on the foregoing analysis by the Court of Appeals, the $9,000 deduction made by Judge Cannella was in error.

Moreover, the $10,000 payment which was made to Mrs. Watson was an accidental death payment under the terms of the Masters, Mates & Pension Welfare rules and regulations. (Watson Ex. 32, Welfare Plan Rules and Regulations, p. 18)* As such, it is a payment for an "independent reason" within the meaning of the Haughton case, as adopted by this Court in Blake. Such payment to the widow was activated by the wrong committed by the companies in causing the death of Mr. Watson. To permit the companies an offset of the $9,000 received would permit them to profit by their own wrongdoing, which is exactly the opposite of the teachings of this Court and a proposition at odds with established principles of law.

*The amount shown in Exhibit 32 is $20,000, the sum now payable for accidental death. At the time of the loss of the Marine Sulphur Queen, the accidental death benefit was $10,000.

POINT III

THE DISTRICT COURT ERRED IN MAKING A DEDUCTION FOR INCOME TAXES IN THOSE YEARS WHERE THE DECEDENT'S PROJECTED GROSS INCOME EXCEEDED $25,000 ANNUALLY, DURING WHICH YEARS THE INCOME RANGED FROM $28,044 to $34,933 PER YEAR.

The controlling authority for guidance on the question of deduction for income taxes is the case of McWeeney v. New York N.H. and H.R.R. Co., 282 F. 2d 34 (2nd Cir. 1960), cert. denied 364 U. S. 870 (1960).

That case, decided some fifteen years ago, established certain parameters for guidance to the courts in considering this issue. The Court of Appeals, sitting en banc, stated that estimated future income taxes should not be deducted in "the great mass of litigation at the lower or middle reach of the income scale where future income is fairly predictable, added exemptions or deductions drastically affect the tax and, for the reasons indicated, the plaintiff is almost certain to be undercompensated for loss of earning power in any event". (282 F. 2d at 39) As an example of a case where income tax should be considered, the Court postulated a situation where potential earnings of a decedent would be $100,000 per year. (282 F. 2d at p. 38)

The earnings of Captain Watson in this case do not nearly approach the $100,000 example described in McWeeney.

In the years for which the District Court made a deduction for taxes, annual earnings were as follows:

1970	$28,404
1971	30,676
1972	29,331
1973	31,091
1974	32,956
1975	34,933

(J.A. p. 278a, 279a)

Certain broad principles may be drawn from the teaching of McWeeney. Primarily, the Court was consciously aware that there were two important factors that substantially reduce any verdict obtained in wrongful death actions, and which thereby militate against verdicts that might appear too high if income taxes were not deducted. These two elements were inflation and attorneys' contingent fees. The Court, in giving judicial notice to these countervailing factors, stated as follows:

> "The first is inflation. Though some courts have sanctioned instructions permitting the jury to take into account inflation between the injury and the trial, there is little or no authority in favor of charging the jury to take future inflation into account, see 2 Harper and James, The Law of Torts, Section 25.11 (1956). Yet there are few who do not regard some degree of continuing inflation as here to stay and would be willing to translate their own earning power into a fixed annuity. [footnote] and it is scarcely to be expected that the average personal injury plaintiff will have the acumen to find investments that are proof

against both inflation and depression -- a task formidable for the most expert investor. The effect of inflation of 1% a year over Mc Weeney's 29-year expectancy at trial would go a long way toward offsetting any excess in the verdict due to failure to deduct income tax. /footnote/

"The second offsetting factor is that the supposedly overcompensated plaintiff does not retain his entire recovery or anything like it. Whatever the reasons of history or policy for the American practice of generally not awarding attorneys' fees to the successful party, see Goodhart, Costs, 38 Yale L. J. 849, 872-78 (1929), we can hardly shut our eyes to this when asked to require the jury to take another extrinsic factor into account -- particularly when we know that even court-prescribed maximum scales of contingent fees, which have been attacked by counsel as inadequate, provide either a sliding scale ranging from 50% down to 25% or a flat amount of 33-1/3%, N.Y. App. Div. 1st Dept., Special Rules Regulating theConduct of Attorneys and Counsellors at Law, Rule 4."

282 F. 2d, at p. 38.

Since the time of McWeeney and its progeny, we have arrived at 1975. The impact and portents of inflation, perhaps only of moderate significance at the time of McWeeney in 1960 (as recited above, the Court in McWeeney noted it at 1% annually), have now become a clear and present danger, and were so for the years past in which the District Court made a deduction for taxes.

If a 1% inflationary figure was of concern to the Court in 1960, enough so as to make it bulk large in the minds of the judges sitting en banc at that time, a fortiori, the

present skyrocketing inflationary rates are all the more pertinent today, and all the more erosive on the amount of damages recovered.

The second offsetting factor mentioned in McWeeney, the contingent fee retainer arrangement, remains the same today and continues to act as a brake against a possibly excessive award.

Aside from giving guidance by way of monetary parameters, McWeeney also significantly gives a substantial clue by way of its description of those cases where income tax is to be deducted. These deduction cases, said the Court, are a "limited class of cases", or cases "which in proportion are relatively few." (282 F. 2d 34 at p. 38)

It is submitted that the case of Captain Watson, a monthly wage earner, clearly is within the "middle reach of the income scale", where taxes should not be deducted.

McWeeney remains viable in this Circuit. In the case of Petition of Marina Mercante Nicaranguense, S.A. (S.S. El Salvador), 248 F. Supp. 15 (S.D.N.Y. 1965), Judge Weinfeld, in calculating damages, deducted income tax from the gross earnings which were found. On appeal in Marina Mercante Nicaraguense, S.A. v. McAllister Bros. Inc., 364 F. 2d 118 (2d Cir. 1966), this Court reversed Judge Weinfeld on this point, and modified his findings to eliminate the deduction of taxes. In so doing, the Court stated as follows:

> "In McWeeney v. New York, N.H. & H. R.R. Co., 282 F. 2d 34, 35-39 (2 Cir), cert. denied, 364 U.S. 870, 81 S. Ct. 115, 5 L.Ed. 2d 93 (1960), the court sitting en banc laid down the rule to be followed on deductions for income taxes 'where the question is one of federal law or the applicable state law is silent.' 282 F. 2d at 39. We there held that estimated future income taxes should not be deducted in 'the great mass of litigation at the lower or middle reach of the income scale, where future income is fairly predictable, added exemptions or deductions drastically affect the tax and * * * the plaintiff is almost certain to be undercompensated for loss of earning power in any event.' The undercompensation would arise from the erosion of the recovery due to the failure to award attorneys' fees, almost always high in this type of litigation because of their contingent nature, and to continuing inflation; we noted also that deduction of the income tax on the estimated earnings simpliciter took no account of the tax payable on the income from the lump sum award given to replace them; see Meehan v. Central R.R., 181 F. Supp. 594, 623-624 (S.D.N.Y. 1960) -- a factor particularly important in death cases, both because the loss of earnings is total and because the income from the lump sum will be taxable without benefit of income splitting unless the surviving spouse remarries."
>
> 364 F. 2d at p. 125

This added observation that income from the lump sum will be taxable and, further, that such taxation will be without benefit of income splitting unless the surviving spouse remarries, is in fact the situation in the instant case where Mrs. Watson has not remarried.

We are not unmindful of the case of LeRoy v. Sabena Belgian World Air Lines, 344 F. 2d 266 (2nd Cir. 1965) cert. denied 382 U.S. 878 (1965), wherein the Court of Appeals af-

firmed the findings of Judge Murphy that in that case, it was appropriate to make a reduction for income taxes.

However, the situation in that case, in light of the guidelines laid down in McWeeney, is clearly distinguishable from the facts in the instant situation -- if not simply by reason of the passage of ten years into the current era of spiraling inflation.

In LeRoy, the crucial differentiating factor was the otherwise potential size of the verdict. Judge Murphy found that the decedent had anticipated annual income of $16,000 running to $25,000, and, most important, a work expectancy of thirty-seven years. Thus, the gross amount without adjustment that Judge Murphy calculated would have been earned by the decedent before retirement at age sixty-five was $600,000.

Such a $600,000 figure and a thirty-seven year continued work expectancy from the date of death, are in excess of the figures in the cases at bar. Here, the Court found Captain Watson to have a thirteen year work expectancy, with gross earnings over that span of $315,958. (J.A. p.278a,279a)

Marina Mercante Nicaraguense, S.A., vs. McAllister Bros., supra, which reversed Judge Weinfeld's deduction for income taxes, was decided after the LeRoy case, and made note significantly of the distinguishing feature in LeRoy -- the total future income of some $600,000. In reversing Judge Weinfeld's deduction for income tax, the Court stated:

> "We see no basis, however, for thinking that workers on tugboats in New York harbor should be considered among those high income earners to which the exception applies. The estimated annual earnings here, $11,000 to $11,500 for Fargo, $9,300 to $10,500 for Salvesen, and $11,000 to $11,500 for Evans, bear more resemblance to McWeeney's $4,800, Montellier's $12,000 and Cunningham's $6,300, all factored upward for subsequent inflation, than to Dr. LeRoy's $16,000 to $25,000 estimated to produce total future income of some $600,000. Death cases, where the deprivation of earnings is certain, would seem particularly poor candidates for extending the deduction." (Emphasis supplied)
>
> 364 F. 2d at p. 126.

We are now some eight years deeper in the inflationary hole since the Marina Mercante case and, we submit, even the rationale for deducting taxes in the LeRoy case itself with its potential $600,000 gross earnings may no longer be realistic.

On the basis of the McWeeney guidelines, the facts in this case, and the events of inflation as known presently, we submit that no deduction for income taxes should be made in the instant cases.

We also call the Court's attention to the fact, as stated previously in this brief, that the amount deducted by the District Court was more than twice as much as that urged by the companies.

POINT IV

THE DISTRICT COURT ERRED IN REFUSING TO MAKE ANY AWARD FOR THE VALUE OF THE FRINGE BENEFITS CLAIMANT LOST BY REASON OF HER HUSBAND'S DEATH

The District Court denied Mrs. Watson any damages for the value of the fringe benefits which would have inured to her benefit while her husband was employed. Claimant proved at the trial that while her husband was alive, she was entitled to various health and medical benefits provided by the Masters, Mates & Pilots Welfare Plan, a jointly trusteed labor-management benefit fund (Watson Exhibit 32), and as a consequence of his death she no longer was entitled to such benefits. In accordance with Petition of United States Steel Corporation 436 F. 2d. 1256 at 1272 (6th Cir. 1970), cert. denied 402 U.S. 987 (1971) reh. denied 403 U.S. 924, 403 U. S. 940 (1971), and Mungin v. Calmar Steamship Corp. 342 F. Supp. 479 at 482 (D. Md 1972), the claimant offered proof as to the value of such of those fringe benefits which would have accrued to her benefit. She did not claim that the entire amount paid by her husband's employer to the Masters, Mates & Pilots Welfare Plan by reason of her husband's employment*

* $5.53 per day of employment at the time of trial (J.A. p. 233a)

constituted recoverable damage, as such contributions paid for benefits to which he would have been entitled as well as for benefits to which she had been entitled.

Claimant testified, without objection, that for hospital and medical coverage at the time of trial, she was paying $60. per year toward Blue Cross and Blue Shield coverage which was matched by her employer, the Federal government, and that she also carried additional health insurance for which she paid $204 per year. (J.A. p. 54a, 55a)

Thus, claimant offered proof that at the time of trial the value of such benefits, measured by what was being paid to obtain comparable benefits for her, was $324. per year.

The shipowners offered no proof at all as to the value of the health and medical benefits which the claimant lost by reason of her husband's death.

Since the claimant proved "the value of these fringe benefits which would inure to the benefit of decedent's family had he lived, "and not merely "what his employer would have paid into the plans" an award for this item of damage was warranted. Sweeney v. American Steamship Company 491 F. 2d 1085 at 1090 (6th Cir. 1974).

POINT V

THE DISTRICT COURT ERRED IN FAILING TO ADD AN ANNUAL 4 1/2% INCREMENT FOR PROJECTED INFLATION AND/OR COST OF LIVING INCREASES IN CALCULATING THE DECEDENT'S LOST PENSION.

In assessing the pecuniary loss sustained by dependent beneficiaries of a decedent, the reasonable probability of wage increases into the future, subsequent to the trial, is an element that must be considered. Curry v. U.S., 338 F. Supp. 1219 at 1222 (N.D. Calif. 1971)

In calculating the projected amount of the decedent's lost pension, the District Court failed to take into consideration evidence adduced at the trial showing a strong probability that at the time of the decedent's projected retirement, changes in the decedent's collective bargaining agreement would have been made so as to provide for an annual increment in retirement benefits, such increment probably being 4 1/2% annually.

Prior increases in existing pension benefits are not new to the Masters, Mates & Pilots Pension Plan. Kenneth Camisa, who had served as Director of Research for the decedent's union, and who is an economist by education and presently a consultant on employee benefits, testified that in recent years, in two Master, Mates & Pilots collective bargaining agreements, pensions were increased by 5% for existing pension-

ers. In addition, in the last collective bargaining negotiations, one of the union's proposals was for an automatic cost-living adjustment for the pension plan,but at that negotiating go around, the union was not successful in obtaining such a provision. (J.A. p. 111a, 112a)

Mr. Camisa further testified that the current Federal retirement system provides for an automatic cost of living escalator, and that amendments to the Social Security Program commencing in 1975, similarly provide an automatic cost of living increase similar to that of the Federal Retirement System (J.A. p. 119a, 120a)

It was Mr. Camisa's opinion that inflation in future years would be much higher than 4 1/2%, which coincided with the testimony of the plaintiff's other expert, Dr. Oscar Ornati, a labor economist, that for the period 1974 through 1995 there will be an average annual price increase of 4.5%.(J.A.p.158a,193a)

Despite this expert testimony, and the clear trend in the Union's collective bargaining agreements, which for the last six years have provided annual wage increases of 6%, the District Court erroneously failed to provide for an annual increase in pension amounts, which, as the evidence shows, would most probably be at 4 1/2 per cent annually.

The inflationary trend in our economy and its resulting application to pension benefits was a relevant factor that the District Judge should have considered. As this Court said in

McWeeney v. New York N.H. and H.R.R. Co., 282 F. 2d 34 (2nd Cir. 1960) Cert. denied, 364 U. S. 870 (1960), " ... there are few who do not regard some degree of continuing inflation as here to stay and would be willing to translate their own earning power into a fixed annuity." 282 F. 2nd at 38.

Based on the foregoing, and the evidence at trial, it was error for the Court not to apply an annual cost of living increment to the decedent's projected pension earnings, and that such increment should be at the rate of 4 1/2 per cent annually.

CONCLUSION

FROM THE FOREGOING, IT IS RESPECTFULLY URGED THAT THE OPINION AND JUDGMENT OF THE DISTRICT COURT BE REVERSED ON THOSE POINTS HEREINABOVE SET FORTH, AND THAT, WHERE APPROPRIATE, THE CASE BE RETURNED TO THE DISTRICT COURT FOR FINDINGS IN THE MANNER URGED HEREIN.

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